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No. 86-103

Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1986

ARLINGTON HOTEL COMPANY, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1 pp

TABLE OF AUTHORITIES

Page

Cases:

Methodist Hospital, Inc. v. *NLRB*, 619 F.2d 563, cert. denied, 449 U.S. 889 4

NLRB v. *Erie Resistor Corp.*, 373 U.S. 221 3-4

NLRB v. *Great Dane Trailers, Inc.*, 388 U.S. 26 4

Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 4

Randall Div. of Textron, Inc. v. *NLRB*, 687 F.2d 1240, cert. denied, 461 U.S. 914 4

Statute:

National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.* :

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2

§ 8(a)(3), 29 U.S.C. 158(a)(3) 2

§ 8(a)(5), 39 U.S.C. 158(a)(5) 2

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Petitioner contends that the court of appeals erred in holding that it engaged in an unfair labor practice by recalling economic strikers only to their pre-strike positions and refusing to consider them for other jobs that they were qualified to perform.

1. On March 13, 1981, approximately 66 service employees of petitioner—including waitresses, maids, busmen, kitchen help, bellmen, and maintenance workers—began a strike. At the conclusion of the strike, which lasted three days, the Union[1] notified petitioner that the strikers were applying "unconditionally for reinstatement to their old positions and/or their maximum employment[] rights under the law." Pet. App. A38. Upon learning that the

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[1]Southern Missouri-Arkansas District Council, International Ladies' Garment Workers' Union, AFL-CIO.

strike had ended, petitioner stopped hiring replacements and implemented a system for recalling strikers who had been permanently replaced during the strike. Under this system, where no opening existed in an employee's pre-strike position, the employee was required to await such an opening, and was not considered for any other job regardless of his qualifications, previous jobs with petitioner, or willingness to return to work in a different job. Using this system, petitioner reinstated 31 of the 66 striking employees to their pre-strike jobs when the strike ended and recalled an additional 10 strikers within several weeks. The other 25 striking employees were not reinstated, even though, as of December 1981, petitioner had hired over 200 new employees in positions for which the unreinstated strikers were qualified. In addition, consistent with its policy of cross-training and developing multiple capabilities for its employees, petitioner filled numerous vacancies by transferring non-striking employees between departments. Pet. App. A38-A39.

2. On March 23, 1981, the Union filed an unfair labor practice charge, alleging that petitioner had violated Sections 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act), 29 U.S.C. 158(a)(1), (3) and (5) (Pet. App. A39).[2] In December 1981, an Administrative Law Judge (ALJ) held a hearing on the Union's charges. On August 9, 1982, the ALJ issued an opinion holding, inter alia, that petitioner, in violation of Sections 8(a)(1) and (3), had discriminated against the strikers by hiring new employees to fill vacancies for which the replaced strikers were qualified (see Pet. App. A5-A36).

On December 12, 1984, the National Labor Relations Board (the Board) issued an order affirming the findings and conclusions of the ALJ (Pet. App. A1-A3). The Board

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[2]That charge was later amended and consolidated with a second charge (Pet. App. A39).

noted that petitioner's refusal to consider the strikers for available positions, in light of its policy of cross-training and its practice of transferring employees to fill vacancies, was unsupported by any possible business justification (Pet. App. A2).

3. The court of appeals enforced the Board's order (Pet. App. A37-A42). The court noted that petitioner's recall policy "clearly discriminated against unreinstated strikers in favor of new job applicants and employees—including permanent striker replacements—already on the payroll" (*id.* at A41-A42). It pointed out that petitioner's discriminatory conduct was "particularly clear when viewed in light of [petitioner's] long-term policy of favoring cross-training and multiple capabilities of all Hotel employees" (*id.* at A41).

4. Petitioner maintains (Pet. 4) that the issue presented in this case is whether an employer is obligated under the Act to recall permanently replaced economic strikers to any position for which they are qualified where their former or substantially equivalent jobs are not available. In fact, however, as the opinions of the Board and the court of appeals in this case make clear, the broad issue identified by petitioner is not presented on this record. As petitioner essentially concedes (Pet. 8-9), the Board and the court of appeals did not rule that petitioner had a general obligation to hire the strikers for positions other than substantially equivalent ones. Rather, the Board and court of appeals upheld the ALJ's finding that petitioner discriminated against the strikers by refusing, solely on account of their status as strikers, to consider them for positions for which they were qualified.

It is well established that strikers have a right not to be discriminated against in any manner for having engaged in a strike. See, *e.g.*, *NLRB* v. *Erie Resistor Corp.*, 373 U.S.

221, 233 (1963). Thus, whether or not it was under an affirmative duty to give preference to strikers in filling the jobs, petitioner was under an obligation to accord to its striking employees at least the same consideration for vacancies accorded to non-striking employees and other job applicants. See generally *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 186-187, 189 (1941); *Methodist Hospital, Inc.* v. *NLRB*, 619 F.2d 563, 571 (6th Cir.), cert. denied, 449 U.S. 889 (1980); see also *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 32 (1967) (unlawful to grant vacation benefits solely to non-strikers and striker replacements without a substantial business justification); *Randall, Div. of Textron, Inc.* v. *NLRB*, 687 F.2d 1240, 1246-1247 (8th Cir. 1982), cert. denied, 461 U.S. 914 (1983) (unlawful to grant active employees preference over strikers in selection for openings in "special rated" jobs). In this case, petitioner's recall policy was discriminatory because strikers—as a result of their activity—were considered only for their same or substantially equivalent jobs, while other jobs were filled by transferring non-striking employees or hiring new ones.[3]

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[3]Petitioner errs in asserting (Pet. 6-7, 10, 13) that its discriminatory conduct was mandated by prior Board precedents. The various authorities relied upon by petitioner (*ibid.*) are inapposite; they do not hold that an employer may discriminate against a striker by refusing to consider him for an interim position because of his striker status.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1986